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THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

WILLIAM McCLAIN (an Individual),

Plaintiff,

v.

GARCO CONSTRUCTION, INC. (a
Washington state corporation; ERIC
JONES (an agent of Garco Construction,
Inc.); JUSTIN LUDWIG (an agent of
Garco Construction, Inc.); ERIC JONES
(an agent of Garco Construction, Inc.;
and TIM HUTTON (an agent of Garco
Construction, Inc.);

Defendants.

Case No.

NOTICE OF REMOVAL BY
DEFENDANTS TO THE UNITED
STATES DISTRICT COURT

PLEASE TAKE NOTICE that the Defendants Garco Construction, Inc.
("Garco"), Eric Jones, Justin Ludwig, and Tim Hutton (collectively "Defendants")
do hereby appear through undersigned counsel and remove to the United States

1 District Court for the Eastern District of Washington the above-referenced action.
2 This action was filed in the Superior Court of the State of Washington in and for
3 Spokane County, but no Defendant in this matter has been served with a Summons
4 and Complaint. Removal is proper under Federal Question Jurisdiction (28 U.S.C.
5 § 1331) because Plaintiff asserts claims under Title VII of the Civil Rights Act of
6 1964 and Section 1981 of the Civil Rights Act of 1866—both federal laws over
7 which this Court has original jurisdiction. Pursuant to 28 U.S.C. § 1367(a), this
8 Court has Supplemental Jurisdiction over Plaintiff's state law claims, including
9 those asserted under the Washington Law Against Discrimination ("WLAD").
10 Removal is timely for the reason set forth below, and all procedural requirements
11 under 28 U.S.C. § 1446 have been satisfied.
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13 I. GROUNDS FOR REMOVAL

14 A. PROCEDURAL BACKGROUND.

15 Plaintiff was a carpenter apprentice who was dispatched to work on a Garco
16 construction Project in March 2022. Plaintiff performed poorly from the start, and
17 as a result, he was laid off the job in April 2022. Shortly thereafter, on August 15,
18 2022, Plaintiff filed a Charge of Discrimination against Garco with the Equal
19 Employment Opportunity Commission ("EEOC") alleging discrimination and
20 retaliation based on race. In turn, Garco filed a Position Statement contesting
21 Plaintiff's Charge.
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1 While Plaintiff's EEOC Charge was pending, Plaintiff filed the instant lawsuit
2 on May 26, 2023, in Spokane County Superior Court ("First Complaint"). Therein,
3 Plaintiff alleged the same unlawful conduct asserted in the EEOC Charge, except
4 Plaintiff added, as other defendants, individuals claimed to have been involved in
5 the alleged acts comprising the discriminatory and retaliatory conduct. To date,
6 Plaintiff has not effectuated legal process on any of the Defendants with the First
7 Complaint.¹

10 Garco learned of the filing of the First Complaint when, on June 8, 2023, the
11 EEOC issued a Dismissal of Charge and Notice of Right to Sue, indicating that it
12 was closing the charge because Plaintiff had already filed a lawsuit on the matter.
13 Undersigned counsel for Garco then contacted Plaintiff's counsel's staff and offered
14 to accept service on behalf of Garco, if presented with an Acceptance of Service
15 form for consideration.

18 Undersigned counsel has yet to receive an Acceptance of Service despite
19 multiple conversations with Plaintiff's counsel's staff between May 2023 and July
20 2023. Then, on July 18, 2023, Plaintiff filed another complaint under the same cause
21 number, which is substantively identical to the First Complaint, save corrected
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25 ¹ Attached hereto is a true and correct copy of the Spokane County Superior Court
26 file, which contains a copy of each of the Complaints Plaintiff has filed.
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1 typographical errors (“Second Complaint”). The next day, Plaintiff’s counsel and/or
2 his staff delivered a courtesy copy of the Second Complaint to undersigned counsel’s
3 firm but did not deliver an Acceptance of Service for Garco’s consideration.
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5 In late August 2023, the individual defendants retained undersigned counsel
6 to represent them in the lawsuit; albeit, like Garco, they have not been served. There
7 was no further action in this case until October 9, 2023—when counsel and/or his
8 staff again delivered a courtesy copy of the third Complaint, which was filed on
9 October 5, 2023 (“Third Complaint”), but again did not effectuate service. The Third
10 Complaint is substantively identical to the Second Complaint. Moreover, at no time
11 has Plaintiff filed or served a Summons directed to any Defendant, as required by
12 CR 4.²
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16 As a result of the above-described deficiencies, no defendant in this matter
17 has been served with process. *See* RCW 4.28.080; CR 4. Thus, the 30-day period to
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20 ² Despite Plaintiff failing to effectuate service, an Affidavit of Personal Service was
21 filed on October 9, 2023, wherein the affiant attested to having served the Third
22 Complaint at the undersigned counsel’s firm—Hawley Troxell Ennis & Hawley LLP
23 (“Hawley Troxell”). Neither Hawley Troxell nor undersigned counsel serve as the
24 registered agent for Garco, and moreover, undersigned counsel has never been asked
25 or agreed to accept service for Defendants Eric Jones, Justin Ludwig, or Tim Hutton.
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1 remove has not been triggered against any defendant and removal is timely. *See* 28
2 U.S.C. 1446(b); *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999)
3 (the 30-day removal period begins to run from the date of formal service).
4 Furthermore, removal before service is proper. *See Failing v. Washington State*
5 *Liquor & Cannabis Bd.*, 2020 WL 1166083, at *1 (E.D. Wash. Mar. 11, 2020);
6 *Novak v. Bank of New York Mellon Tr. Co., NA.*, 783 F.3d 910, 914 (1st Cir. 2015)
7 (“As far as we can tell, every one has concluded that formal service is not generally
8 required before a defendant may file a notice of removal.”). By removing this matter
9 before service, defendants do not waive service of process or sufficiency of process.
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13 **B. REMOVAL IS PROPER ON FEDERAL QUESTION AND SUPPLEMENTAL**
14 **JURISDICTION GROUNDS.**

15 Under 28 U.S.C. § 1441(a), “any civil action brought in a State court of which
16 the district courts of the United States have original jurisdiction, may be removed by
17 the defendant or the defendants, to the district court of the United States for the
18 district and division embracing the place where such action is pending. Pursuant to
19 28 U.S.C. § 1331, this Court has original jurisdiction of all civil actions arising under
20 the laws of the United States (Federal Question Jurisdiction). In the operative
21 Complaint, Plaintiff alleges discrimination, hostile work environment, and
22 retaliation under Title VII of the Civil Rights Act of 1964 and Section 1981 of the
23 Civil Rights Act of 1866—both federal laws over which this Court has original
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jurisdiction. *See* Third Compl. ¶¶ 2.3, 2.4, 2.18, 2.19, 2.20, 2.24, 3.1, 3.2, 3.3. Thus, removal is proper based on federal question jurisdiction.

Pursuant to 28 U.S.C. § 1367(a), this Court also has Supplemental Jurisdiction over Plaintiff's claims arising under Washington law, including those arising under the Washington Law Against Discrimination, R.C.W. § 49.60 *et. seq.*, because the claims "are so related . . . that they form part of the same case or controversy" 28 U.S.C. § 1367(a). The acts constituting both the federal and state claims arise from the same nucleus of operative fact. *See generally* Third Compl.; *see also* *McElroy v. Valley Joist, LLC*, No. 3:21-CV-00079-MMD-CLB, 2021 WL 1401491 at *2–3 (D. Nev. Apr. 13, 2021).

C. DEFENDANTS SATISFY OTHER REMOVAL REQUIREMENTS.

This Notice of Removal is timely under 28 U.S.C. § 1446(b)(1),(b)(2)(B) because Plaintiff has not served any Defendant with a Summons and Complaint, and resultingly, the 30-day removal period has not been triggered for any Defendant. *Id.* Additionally, 28 U.S.C. § 1446(b) is satisfied because all Defendants consent to removal.

Pursuant to 28 U.S.C. § 1441(a) and § 1391, venue lies in the United States District Court for the Eastern District of Washington because the state court action was filed in this District. *See* 28 U.S.C. § 128(b).

1 Pursuant to 28 U.S.C. § 1446(d), all adverse parties are being provided written
2 notice of the filing of this Notice of Removal, and a copy of this Notice is being filed
3 with the Clerk of the Superior Court of the State of Washington in Spokane County.
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5 The proof of service of this Notice to Adverse Party of Removal will be filed with
6 this Court.

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8 Promptly after filing this Notice of Removal, the undersigned will provide
9 written notice of the removal to Plaintiff, through opposing counsel, and file the
10 same with the Clerk of the Spokane County Superior Court as required under 28
11 U.S.C. § 1446(d).

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13 Respectfully submitted on this 26th day of October, 2023.

14 HAWLEY TROXELL ENNIS & HAWLEY
15 LLP

16 s/ Abigail Maurer-Lesser

17 William M. Symmes, WSBA No. 24132
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23 Email: AMaurer@hawleytroxell.com
24 *Attorneys for Defendants*

CERTIFICATE OF SERVICE

The undersigned hereby certified under penalty of perjury under the laws of the State Washington that on the 26th day of October, 2023 the foregoing was delivered to the following persons:

Joe Kuhlman, WSBA No. 42884 The Kuhlman Law Office 1408 W. Broadway Ave Spokane, WA 99201 509-904-0500 <i>Attorney for Plaintiff</i>	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Via Electronic Mail:
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DATED this 26th day of October, 2023.



Janet Jackson, Legal Administrative
Assistant